IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 15, 2008

ALFRED WILLIAM SMITH v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for McMinn County
No. 06-426 Donald P. Harris, Senior Judge

No. E2007-02457-CCA-R3-PC - Filed January 15, 2009

A McMinn County jury convicted the Petitioner, Alfred William Smith, of first degree premeditated murder, for which the trial court imposed a life sentence. We affirmed the Petitioner's conviction on direct appeal. The Petitioner then filed a post-conviction petition claiming he received the ineffective assistance of counsel at his trial. The post-conviction court denied relief, and the Petitioner now appeals, claiming that his trial counsel was ineffective because he: (1) failed to object to expert medical testimony that the victim's injury was an "overkill type injury"; (2) failed to ensure that the Petitioner properly waived his right to testify; and (3) opened the door to the introduction of the Petitioner's prior bad acts. After a thorough review of the record and applicable law, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

C. Richard Hughes and Jeanne L. Wiggins, Madisonville, Tennessee, for the Appellant, Alfred William Smith.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Deshea Dulany, Assistant Attorney General; Steven Bebb, District Attorney General; Phillip H. Morton, Assistant District Attorney General pro tem, for the Appellee, State of Tennessee.

OPINION
I. Facts
A. Trial and Sentencing

On direct appeal, this Court set forth the following factual summary:

> On Sunday morning January 12, 2003, the body of the victim, Betty White, was discovered near the edge of a field along McMinn County Road 448.

The victim had suffered multiple trauma to her head and body, and her body had been run over by a vehicle.

Shanda Bivens, a friend of the victim, testified that she visited the victim on January 11. In the midafternoon, a green car went by the victim's residence, and the victim said, "There goes Al." Later, the victim spoke on the telephone with someone she addressed as "Al," and Ms. Bivens overheard the victim tell the person, "It's over." The victim was upset and crying. Ten or fifteen minutes later, the defendant, who had been the victim's boyfriend, stopped his vehicle on the road in front of the victim's residence, and the victim walked to the road to talk to the defendant. The vehicle was a green Mercury that the defendant and the victim owned jointly. The victim later talked on the phone again and told the person on the line, "It's over."

The victim's 18-year-old son, Dustin Rymer, testified that the defendant and the victim had maintained a relationship for five or six years before the victim's death. He testified that, on one occasion, he came to their residence and found the defendant holding a knife to the victim's throat, and a few days later he found the defendant with his fist drawn back to hit the victim in the face. On both occasions, Mr. Rymer chased the defendant away from the residence with a baseball bat. Mr. Rymer testified that these episodes precipitated an estrangement of the couple.

On the evening of January 11, 2003, Mr. Rymer came home about 8:30 and ate dinner. He then left to go to his girlfriend's house. The victim called Mr. Rymer about midnight and told him she would be ready to go to church the next morning. Apparently, Mr. Rymer came home and went to bed, but when he awoke Sunday morning, the victim was not in the residence. He learned of her demise about 11:00 a.m.

Bernice Cansler testified that in the late night of January 11 and early morning of January 12, 2003, she was standing on the premises of McMinn Villa hoping to obtain cocaine. She saw the victim, whom she knew, drive up in a green car, and the defendant, whom she also knew, was riding in the passenger seat. The defendant got out of the car and engaged in a conversation or transaction with another individual, got back in the green car, and left. The green car returned again between 3:00 and 4:00 a.m., and the same scenario was repeated.

Sherby Collom, the defendant's son-in-law, testified that the defendant occupied a room in the house where Mr. Collom and his family resided. When Mr. Collom came home from work about 11:00 p.m. on January 11, 2003, the green Mercury was parked in its usual place, and based upon the voices that Mr. Collom heard and recognized, the defendant and the victim were in the defendant's room. Mr. Collom noticed that the defendant and the victim were

still in the defendant's room about 1:30 a.m., and when he awoke at 7:30 the next morning, the defendant was in his room asleep. Later that day, the police came to the house, and Mr. Collom gave them permission to search the house. A few days later, the family's puppies pulled out a pair of the defendant's tennis shoes from under a rug in the laundry room, and Mr. Collom gave the shoes to the police. Also, one of the puppies pulled one of the Mercury's floor mats from behind an abandoned refrigerator behind the house. The mat was stained, and Mr. Collom gave it to the police.

Other testimony revealed that, on January 12, 2003, a bent, blood-stained machete with broken handles was discovered alongside the road in the general vicinity of the victim's body. A sheath that would have accommodated the machete was found in the grass near the victim's body.

Upon gathering information about the victim and her associates, the investigating officers went to the Collom residence in search of the defendant. The green Mercury parked in the Collom's yard had a clump of grass protruding from the driver's door. At the officers' request, the defendant unlocked the car and allowed them to inspect it. They found a large pool of blood in the front floor of the passenger's side. The floor mats were missing. What appeared to be blood on the passenger door had been wiped. Underneath the car, the officers saw what appeared to be blood and also black hair wrapped around a bolt on the undercarriage. The swatch of hair had caught an earring that matched an earring found in the center of the victim's neck at the crime scene.

A Tennessee Bureau of Investigation (TBI) agent who interviewed the defendant testified that the defendant showed no emotion when told that the victim had been killed. In the interview, the defendant admitted that he had been with the victim until midnight but that she had taken the Mercury home afterward. He claimed to have no knowledge how the car was returned to the Collom residence by Sunday morning.

Seriological tests revealed that the machete, the interior and the undercarriage of the Mercury, and the floor mat retrieved from behind the discarded refrigerator all bore the victim's blood. A pair of the defendant's tennis shoes also bore some of the victim's blood. An analysis of a laboratory slide containing material taken from the victim's vagina revealed the presence of the defendant's DNA. No fingerprints, however, were found on the machete, and the jeans worn by the defendant on the night of January 11-12 bore none of the victim's blood.

The McMinn County medical examiner testified that the victim suffered three different types of injuries. First, she sustained parallel slash injuries to the back of her right forearm. The injuries were caused by an object that was not sharp-edged but one that was applied with enough force to break the arm.

> Second, the victim had been stabbed by a single-edge knife-there were "many, many" stab and slash wounds to the face, upper neck, and left side of the trunk. The victim's throat had been slit several times. Third, the victim sustained blunt force trauma from being dragged under the vehicle. This trauma resulted in broken ribs and a fractured right hip.
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> Testifying for the defendant, his daughter, Katrina Collom, opined that she would have heard the defendant using the washing machine or shower on the night of January 11-12, but she heard him do neither. Furthermore, he did not announce a departure from the house on Saturday night as he normally would do, were he leaving.
>
> Mary Smith, the defendant's former wife, testified that she had engaged in altercations with the victim because of the victim's relationship with the defendant. She testified that, on one occasion, Dustin Rymer came to the Smith residence looking for the defendant. She testified that Mr. Rymer demanded to see the defendant and beat on the door with a "jungle knife."

State v. Alfred William Smith, No. E2004-01058-CCA-R3-CD, 2005 WL 1812830, at *1-3 (Tenn. Crim. App., at Knoxville, Aug. 2, 2005), *no Tenn. R. App. P. 11 application filed*. The trial court imposed a life sentence. The Petitioner appealed his convictions, challenging the sufficiency of the convicting evidence and the admission of state-sponsored testimony. *Id.* at *1. This Court concluded that there was sufficient evidence to support the Petitioner's conviction and that he had waived appellate review of the evidentiary issue because there was no contemporaneous objection made when the testimony was given. *Id* at *6.

B. Post-Conviction

The Petitioner filed a petition for post-conviction relief in which he alleged that his trial counsel was ineffective for: (1) failing to object to expert medical testimony that the victim's injury was an "overkill type injury"; (2) failing to ensure that the Petitioner properly waived his right to testify; and (3) opening the door to the introduction of the Petitioner's prior bad acts. At the hearing on the petition for post-conviction relief, the following evidence was presented: The Petitioner testified that he hired his trial counsel ("Counsel") approximately one year before his trial. The Petitioner said that he was incarcerated between the time of his arrest and his trial, and he estimated that Counsel came to visit him three or four times for about fifteen to twenty minutes each visit.

The Petitioner said that he wanted to testify at his trial, and he and Counsel agreed that he would do so. In that regard, Counsel filed a motion to suppress some of the Petitioner's prior bad acts. In the motion, Counsel acknowledged that it was the Petitioner's intention to testify. The motion sought to exclude prior acts of domestic violence, and the trial court ruled that those would be inadmissible if the Petitioner testified. The Petitioner said that Counsel also filed a Notice of Alibi motion in which he acknowledged that the Petitioner may testify on his own behalf. The Petitioner asserted that, before trial, he and Counsel always understood that he

would testify at trial. Then, Counsel asked a witness whether the Petitioner was violent by nature. The trial judge ruled that Counsel had opened the door to the introduction of the Petitioner's prior bad acts, and Counsel advised him not to testify. In a meeting during the trial with Counsel, the Assistant District Attorney, and the trial judge, the Assistant District Attorney agreed that he would not mention the Petitioner's prior voluntary manslaughter conviction from Texas if the Petitioner did not testify. The Petitioner said that Counsel's actions opening the door resulted in the State being able to introduce multiple warrants that had been taken out against him. Further, because the Petitioner could not testify, he could not explain the circumstances of those warrants.

On cross-examination, the Petitioner testified that, at the time of his trial in this case, he had a prior criminal history, which included a voluntary manslaughter conviction. He also had other convictions, one of which was the result of a jury trial. The Petitioner agreed that Counsel told him that he would not make a "very good witness" and would likely do his case "more harm than good," but the Petitioner said that this was because Counsel had opened the door to the Petitioner's prior bad acts. The Petitioner agreed that Counsel successfully sought to exclude some witness testimony about the victim telling a witness that the Petitioner had acted violently toward her on previous occasions. The Petitioner said that he had no complaints about the graphic nature of Dr. Toolsie's testimony;[1] rather, he posited that he did not inflict those injuries.

On redirect examination, the Petitioner testified that he had testified on his own behalf in two previous trials, the only two trials in which he had ever been a defendant before the current matter. The Petitioner said that, at the time he chose not to testify in this case, Counsel had advised him that his prior voluntary manslaughter conviction would be admitted if he testified. The State then pointed out to the Petitioner that the transcript showed that the State's attorney told the Petitioner that he would not mention the Petitioner's Texas conviction if the Petitioner testified and that this occurred before the Petitioner chose not to testify. The Petitioner claimed, however, that he understood the State's attorney to be saying that he would not bring up the conviction only if the Petitioner did not testify.

Counsel testified that the Petitioner retained him in this case. Counsel testified that, after the Petitioner retained him, he filed multiple motions on behalf of the Petitioner, including a motion to suppress the search of the Petitioner's house and car. The police found a large amount of the victim's blood on the undercarriage of the car and some of the victim's blood in the car. The police also found the Petitioner in possession of the keys to the car and found that he had some of the victim's blood on his tennis shoes. Counsel recalled that a floor mat from the car was found behind a refrigerator at the Petitioner's house, and it contained the victim's blood. Counsel said that a witness testified that she saw the victim and the Petitioner together at 3 or 4 a.m. in an area known for drug activity, and the victim's body was discovered later that morning at 7 a.m.

[1]As later described by Counsel, Dr. Toolsie's, who performed the victim's autopsy, testified in graphic detail about her injuries. He also testified that her injuries were an "overkill type" which were in his experience usually inflicted by someone who had known the victim.

Counsel said that he and the Petitioner developed a strategy that the Petitioner was not present at the killing and did not commit this crime. They relied in part on the statement that the Petitioner gave to police in which he explained he was asleep during the time of the murder. This statement was read into the record, and Counsel said that the statement being admitted into evidence factored into their decision about whether the Petitioner should testify. From interviewing the Petitioner, Counsel never felt the Petitioner would make a "great witness." Counsel noted that the victim was someone that the Petitioner had dated for a long time, and he did not show any type of emotion at her death. The Petitioner told Counsel that he was not an emotional man, but Counsel did not feel this would come across well to the jury.

Also with regard to the Petitioner testifying, Counsel said that he told the Petitioner before trial that the State would not be able to ask him about his prior conviction from Texas. During the trial, the judge changed that ruling. Counsel stated that he asked the Petitioner's daughter, who testified on the Petitioner's behalf if her father was a violent man. She said "no." He then asked her if she would "reference [her] father as a gentle man," and she responded affirmatively. The judge ruled that this question opened the door to the Petitioner's prior voluntary manslaughter conviction. Counsel prepared a brief to have the judge reconsider, but the State agreed not to use the conviction whether or not the Petitioner testified. Counsel said he explained this to the Petitioner. Counsel said the Texas conviction did not affect his advising the Petitioner not to testify. That advice, rather, was based upon the facts of the case, the performance of the State's attorney, and the Petitioner's prior domestic violence issues.

Counsel testified he successfully sought to exclude as hearsay some witness testimony about the Petitioner's prior acts of violence toward the victim. There was, however, other evidence from eyewitnesses who witnessed the Petitioner acting violently toward the victim. This evidence was admitted, and Counsel believed it was properly admitted.

Counsel testified that, because their strategy was that the Petitioner did not commit the crime, he did not object to Dr. Toolsie's testimony that this was an "overkill type injury." Counsel offered different suspects who could have committed this crime, one of whom was the Petitioner's ex-wife. Counsel said their strategy was to prove the Defendant did not commit the crime, as opposed to arguing he should be convicted of a lesser-included offense.

On cross-examination, Counsel testified Dr. Toolsie was the medical examiner who performed the autopsy. Counsel admitted he did not know before trial that Dr. Toolsie planned to opine to the jury that the victim's injuries were "overkill" type injuries, which were "usually but not always" perpetrated by someone who knew the victim. Counsel conceded that he was unaware at trial that the Tennessee Supreme Court had ruled that this type of testimony was inadmissible. Counsel said he would have objected to this portion of Dr. Toolsie's testimony had he known about the Tennessee Supreme Court ruling. Counsel said he did not think this testimony was damaging to the Petitioner, however, because their theory was that the Petitioner did not commit the crime. Further, they presented evidence that someone else who had known the victim killed her. Counsel agreed that evidence of domestic violence committed by the Petitioner was presented at the Petitioner's trial.

About the Petitioner testifying, Counsel said he and the Petitioner left that decision open up to and during the trial. They agreed that the Petitioner's testimony would be substantially similar to the statement that he gave to the police. Counsel said when the trial court ruled that Counsel opened the door to the Petitioner's prior bad acts, the State questioned the Petitioner's daughter about two different instances of specific acts of violence by the Petitioner toward her. Counsel did not object to the Petitioner's daughter's testimony about those specific acts of violence, and he said it was not a strategic decision to not object. He said, however, that he understood the trial judge's previous ruling to be that the Petitioner's prior acts of domestic violence were admissible, which was, in part, why he did not object to this testimony.

Counsel acknowledged that he called the Petitioner's ex-wife to testify. He explained it was his attempt to show that other people may have wanted the victim killed. He did not object to the State questioning the Petitioner's ex-wife about her volatile and violent relationship with the Petitioner because he thought that evidence would show that there was a love triangle between the Petitioner, his ex-wife, and the victim that could have gone wrong, resulting in the Petitioner's ex-wife killing the victim.

On redirect examination, Counsel agreed that the Petitioner's ex-wife testified:

> We got a divorce in 2002, and I hated him and I hated her, and I wanted both of them dead, and I went to Hiwassee Mental Health and tried to get some help because I was going to kill myself and I was going to kill them, and I told them.

The Petitioner's ex-wife also testified that she went to the Petitioner's house one night to kill the Petitioner and the victim. Counsel felt this favorable testimony was worth the trade-off for the domestic violence testimony. Counsel further testified his theory at trial was that, considering the number and type of wounds to the victim, this murder had to be perpetrated by more than one person.

After hearing argument, the post-conviction court entered a written order finding the Petitioner failed to prove he was entitled to post-conviction relief and denied the petition for post-conviction relief. It is from this decision that the Petitioner now appeals.

II. Analysis

On appeal, the Petitioner contends that, because he received the ineffective assistance of counsel, the post-conviction court erred when it denied his petition. The Petitioner alleges counsel: (1) failed to object to expert medical testimony that the victim's injury was an "overkill type injury"; (2) failed to ensure that the Petitioner properly waived his right to testify; and (3) opened the door to the introduction to the Petitioner's prior bad acts. The State responds first that the Petitioner failed to file a timely notice of appeal and that this Court should dismiss the appeal pursuant to Tennessee Rule of Appellate Procedure 4(a). The State addresses each of the Petitioner's other arguments on their merits as discussed below.

A. Tennessee Rule of Appellate Procedure 4(a)

We note the following relevant dates to determine this Court's jurisdiction over the Petitioner's appeal. The order denying the Petitioner's petition for post-conviction relief states that it is entered on September 21, 2007. It is file stamped on September 25, 2007. The Petitioner's notice of appeal was October 25, 2007, thirty days after the stamp-filed date. This Court recently held, "[T]he effective date for entry of a judgment or order of sentence is the date of its filing with the court clerk after being signed by the judge." *State v. Stephens*, 264 S.W.3d 719, 729 (Tenn. Crim. App. 2007). Accordingly, we conclude that the Petitioner's notice of appeal was timely filed, and we turn to address each argument on its merits.

B. Ineffective Assistance of Counsel

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2006). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's factual findings are subject to de novo review by this Court; however, we must accord these factual findings a presumption of correctness, which only be overcome when a preponderance of the evidence is contrary to the post-conviction court's factual findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely de novo review by this Court, with no presumption of correctness. *Id.* at 457.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

> First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland,* 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. *Strickland,* 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, but only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. *House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. *House*, 44 S.W.3d at 515.

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

1. Dr. Toolsie's Testimony

The Petitioner contends Counsel was ineffective for failing to object to Dr. Toolsie's testimony that this killing was an "overkill type injury," which was usually, but not always, committed by someone the victim knew. The Petitioner asserts this was beyond Dr. Toolsie's area of expertise and is not admissible pursuant to the Tennessee Supreme Court decision in *State v. Stevens*, 78 S.W.3d 817 (Tenn. 2002). Counsel's failure to object, the Petitioner asserts,

was ineffective and prejudiced him. The State notes in its response that Counsel explained his failure to object by stating that his theory of the case was that someone whom the victim had known killed her, namely the Petitioner's ex-wife. Further, it contends that the Petitioner did not prove that the failure to object prejudiced him.

The post-conviction court found:

> While petitioner's trial counsel might have handled the testimony of Dr. Toolsie . . . more effectively, this court is satisfied the testimony complained of did not alter the outcome of the trial. At trial, there was evidence that on Saturday, January 11, 2003, . . . Ms. White was attempting to terminate her relationship with the petitioner. In response, he was calling and coming to her residence and later that evening, he and Ms. White were together in the defendant's room at his daughter, Katrina Cullom's residence. On two occasions thereafter, petitioner and Ms. White were observed at a drug trafficking location where the petitioner appeared to purchase drugs. They were last observed at that location between 3:00 and 4:00 a.m. Ms. White's body was found only a few hours later. She had been stabbed, hacked and slashed. The car in which they were observed was found the same day her body was discovered at the petitioner's residence. It contained large amounts of blood in the passenger floor board, and the undercarriage of the car bore blood and a swatch of hair. The blood and hair were identified as being that of Ms. White. A floor mat from the vehicle containing Ms. White's blood was later found behind an abandoned refrigerator in the residence where the petitioner lived. Ms. White's blood was found on a pair of petitioner's shoes. The petitioner's DNA was found in Ms. White's vagina, indicating they recently had sexual intercourse. This evidence so strongly leads to the conclusion that petitioner killed Ms. White that the testimony complained of was not a significant factor in his conviction. The admission of this testimony does not undermine this court's confidence in the outcome of the trial.

We conclude that the evidence does not preponderate against the post-conviction court's findings. The testimony presented comported with Counsel's theory of the case, i.e. that the Petitioner's ex-wife, who had admittedly threatened the victim's life in the past, had committed this killing. The fact that this strategy or theory failed does not prove that Counsel was ineffective. Further, the Petitioner has not proven he was prejudiced by Counsel's failure to object to this testimony.

2. Right to Testify

The Petitioner next contends Counsel was ineffective for failing to ensure that the Petitioner properly waived his right to testify. He asserts that he always wanted to testify and did not knowingly and voluntarily refuse his right to testify. The Petitioner notes that the colloquy between he and the trial court regarding his right to testify was inadequate, citing *Momon v. State*, 18 S.W.3d 152 (Tenn. 1999). The State counters that a failure to follow the

Momon guidelines does not in and of itself support the Petitioner's claim and that the Petitioner knowingly waived his right to testify. When deciding this issue, the post-conviction court found:

> While the questions asked petitioner by the trial judge concerning this issue were perhaps not sufficient to establish he voluntarily and personally waived his right to testify in his own behalf as required by Momon, supra, this court is satisfied from the evidence presented that the petitioner personally made the decision not to testify and that this decision was voluntarily made. Had his counsel asked the appropriate questions or encouraged the court to do so, in this court's opinion, [there is] no reasonable probability it would have resulted in his testifying during the trial.

We conclude that the evidence does not preponderate against the trial court's findings. The Petitioner clearly understood that he had a right to testify, as he so stated at the post-conviction hearing. He said that at the time he chose not to testify he was under the mistaken impression that his conviction from Texas for voluntary manslaughter would only come into evidence if he testified. Further, he said that the only reason he did not testify was that this conviction would potentially be admitted into evidence. However, the record clearly indicates and the Petitioner acknowledges that the record shows that the prosecutor said that he would not mention the Texas conviction regardless of the Petitioner's decision to testify. The post-conviction court found that "the petitioner [did not] fail[] to testify because of a fear of the Texas conviction being used against him." We agree, and we fail to see how further questioning of the Petitioner about his waiving his right to testify would have changed the Petitioner's decision to testify or have changed the outcome of the trial.

3. The Petitioner's Prior Bad Acts

The Petitioner contends that Counsel was ineffective by opening the door to the introduction of the Petitioner's prior bad acts. Specifically, the Petitioner complains that Counsel, when questioning Shandra Bivens, opened the door to testimony about the Petitioner's violent acts towards the victim. The record indicates that Counsel asked Shandra Bivens if she had ever seen the Petitioner threaten the victim. Bivens responded negatively. The State requested a jury out hearing where it suggested that Counsel had opened the door to questions about the Petitioner's violent acts toward the victim. The State then questioned the victim's son about a specific instance where he saw the Petitioner holding a knife to the victim's throat. The post-conviction court found that the victim's son's testimony was properly admissible as a means of allowing the State the opportunity to establish intent. *State v. Smith*, 868 S.W.2d 561, 475 (Tenn. 1993). Therefore, the post-conviction court held that Counsel's actions did not warrant the Petitioner post-conviction relief. We agree. As this evidence was admissible pursuant to *Smith*, we cannot conclude that the Petitioner was prejudiced by its admission.

The Petitioner also complains that Counsel opened the door to the Petitioner's violent acts toward other victims, namely Katrina Cullom, his daughter, and Mary Smith, his ex-wife. Counsel asked Cullom if her father was a violent person, to which she responded negatively, and if her father was a gentle man, to which she responded affirmatively. The State again suggested

that this opened the door to specific instances of violent conduct by the Petitioner. The trial court agreed, and the State questioned Cullom about an incident during the week of the murder when her father got a gun, clip, and bullets out of a cardboard box. She asked what he was doing, and he laughed. Cullom said that she could tell that the Petitioner was "high" and that he was a different person when he was "high." The State also questioned Cullom about a time when the Petitioner acted violently toward her. The trial court also allowed the State to ask Mary Smith about the Petitioner's previous domestic abuse against her and his threats to kill her. The admission of this testimony, the Petitioner contends, prejudiced him. The State counters that the weight of the convicting evidence was so great that confidence in the validity of the verdict is not undermined by the admission of this testimony.

With regard to this argument, the post-conviction court concluded, "While petitioner's trial counsel might have handled the testimony of . . . Ms. Cullum and Ms. Smith more effectively, this court is satisfied the testimony complained of did not alter the outcome of the trial." We agree. As previously outlined in this opinion, and in our opinion on the Peititoner's first direct appeal, the weight of the convicting evidence "not only supports the conviction beyond a reasonable doubt but also excludes every other reasonable doubt that the defendant killed the victim." *Smith*, 2005 WL 1812830, at *4. The Petitioner simply has not shown that the outcome of his trial would have been different had this testimony not been admitted. He has not therefore carried his burden of proof with regard to prejudice. He is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and applicable law, we conclude the Petitioner has failed to demonstrate that the post-conviction court erred when it denied his petition for post-conviction relief. Accordingly, we affirm the judgment of the post-conviction court.

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ROBERT W. WEDEMEYER